LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 8 1965
JOHN F. DAVIS, CLERK

No. 770

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

CHICAGO, ROCK ISLAND & PACIFIC R. CO., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI — EASTERN DIVISION

BRIEF OF WESTERN RAILROADS, APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

M. L. CASSELL
J. A. GILLEN
J. J. NAGLE
W. E. DAVIS
W. A. THIE
R. H. STAHLHEBER
H. B. LATOURETTE
R. J. LEHMAN
E. N. BELL
T. L. FARMER
DON MCDEVITT
139 West Van Buren Street
Chicago, Illinois 60605
Counsel for Appellants

March 4, 1965

INDEX

	PAGE
STATEMENT	1
ARGUMENT	1
CONCLUSION	12

CASES CITED

Arrow Transportation Co. v. United States, 176 F. Supp. 411	2
Automobiles From Atlanta, Ga., to Norfolk, Va., 316 I.C.C. 99	3
Bowles v. Willingham, 321 U.S. 503 ,518	7
Cincinnati, New Orleans and Texas Pac. Ry. Co. v. United States, 229 F.Supp. 572 (S.D. Ohio, 1964)	4
Coal from Ill., Ind., and Ky. to Illinois and Indiana, 308 I.C.C. 673, 678	3
Dixie Carriers v. U. S., 351 U.S. 56	2
Federal Trade Commission v. Rubberoid Co., 343 U.S. 470	12
Grain To, From, And Within Southern Territory, 259 I.C.C. 629, 665	6
I.C.C. v. Mechling, 330 U.S. 567	2
I.C.C. v. New York, N. H. & H. R. Co., 372 U.S. 744, 758	11
James McWilliams Blue Line v. United States, 100 F.Supp. 66	2
L. & N. RR. v. Sloss-Sheffield Co., 269 U.S. 217, 234	5

PAGE

Motor Transp. Of Property Incidental To Air, 95 M.C.C. 71, 86 6

Nashua Motor Express, Inc. v. United States, 230 F. Supp. 646, 650 [4] 11

Natural Gas Pipeline Co. of America v. N. Y. C. R. Co., 323 I.C.C. 75, 80 3

New York Central Railroad Co. v. United States, 207 F.Supp. 483, 490 3

Pennsylvania R. Co. v. United States, 216 F.Supp. 199, 202 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 770

CHICAGO, ROCK ISLAND & PACIFIC R. CO., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI — EASTERN DIVISION

BRIEF OF WESTERN RAILROADS, APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

STATEMENT

Appellants, western railroads, pursuant to Rule 16, Paragraph 3, of the Revised Rules of this Court, file this Brief In Opposition to Motions to Affirm filed by the United States and the Interstate Commerce Commission, Federal Barge Lines, Inc. and American Commercial Barge Lines Co., and Waterways Bulk Transportation Council, Inc.

ARGUMENT

Question 1, page 3 of appellants' Jurisdictional Statement, is challenged on page 5 of the Waterways Bulk

Transportation Council's Motion to Affirm, however, the significance of the first Question Presented is made clear by the Argument of Federal and American Barge Lines that they are entitled to the benefits of Section 3(4) of the Interstate Commerce Act when bulk grain is hauled by them in unregulated tows pursuant to the exemption in Section 303(b) of the Act. The western railroads contend that said barge lines are not subject to Part III of the Act when engaged in unregulated service under Section 303(b), and that the Section 3(4) finding is confined to regulated barge traffic.

Federal and American assert that *Mechling, Dixie Carriers,* and *Arrow* cases[1] involved unregulated traffic, but that fact, if it is a fact, was not established on the record in this case, and no confirmation is revealed by a careful reading of those cases. It must be concluded that the Supreme Court has never considered the statutory construction problem posited herein.

Section 2 of the Interstate Commerce Act was utilized by the Commission to circumvent the express limitations of Section 3(4). Waterways Bulk Transportation Council, Inc. contends that the Section 2 finding complies with an all-fours case, *James McWilliams Blue Line* v. *U.S.*, 100 F.Supp. 66. Actually, the *Blue Line* case stands for the principle that a Section 2 violation cannot be justified by the fact that the injured shipper, subsequent to the completion of the through movement by railroad thence coastal water service, reshipped by unregulated barge. It does not stand for the extreme proposition that no evidence of unjust discrimination against a shipper is necessary to support a Section 2 violation finding if there is a possibility

1. *I.C.C.* v. *Mechling,* 330 U.S. 567; *Dixie Carriers* v. *U.S.*, 351 U.S. 56; *Arrow Transportation Co.* v. *United States,* 176 F. Supp. 411.

of a prior unregulated movement by a for-hire water carrier.

In the *Blue Line* case, there was probative evidence of unjust discrimination against a shipper on the record. In the case at bar there is no such evidence. In *Automobiles From Atlanta, Ga., to Norfolk, Va.*, 316 I.C.C. 99, Division 2 of the Commission said that "in every case of unjust discrimination there must exist an aggrieved party, there must be at least one shipper." More recently in *Natural Gas Pipeline Co. of America* v. *N.Y.C. R. Co.*, 323 I.C.C. 75, 80, the entire Commission stated:

> "* * * allegations of unlawfulness under section 2 must be supported by substantial evidence. *Coal from Ill., Ind., and Ky. to Illinois and Indiana*, 308 I.C.C. 673, 678. A finding of unjust discrimination, under the criteria of the statute, may not rest upon mere speculation. Here, there is no evidence that any specific shipper or receiver, in single cars or otherwise, at origin or destination, or at points grouped therewith, has any objection to the assailed rates. Nor is there any room for an inference or presumption of unjust discrimination."

The Commission's Section 2 violation finding in the instant case, 316 I.C.C. 759, 774, is based on pure speculation. Compare *New York Central Railroad Co.* v. *United States*, 207 F.Supp. 483, 490, where an order of the Commission under Section 3 of the Act was held to have failed for "want of adequate supporting findings".

The Government on page 5 of its Motion To Affirm, poses a hypothetical—"If shipper discrimination existed", the Commission's order is justified under Section 2. After acknowledging that there was no testimony at the further hearing that any division resulted in unjust discrimination, it is explained that shippers had intervened in the pro-

ceeding, at the hearings prior to the further hearing, "and produced evidence concerning the impact of the grain rate structure upon shippers and consumers." However, the grain rate structure is based on Section 3(1) of the Act, and at page 771 of 316 I.C.C. 759, the Commission said that it was compelled to reject arguments that the "relief sought by the bargelines would destroy the traditional grain rate structure". Moreover, in the first report of the Commission after the part of the record referred to was closed, it was found that "no evidence was submitted by anyone which would support a finding to show a violation of section 2 of the act". 296 I.C.C. 247, 249. The Commission said nothing of shipper testimony in its reports so it could not have been the basis for its finding. See *Pennsylvania R. Co.* v. *United States,* 216 F.Supp. 199, 202.

There is no evidence on the record that "railroads received from shippers similarly situated substantially different charges for the same transportation service". See page 6 of the Government's Motion to Affirm. Therefore shipper testimony was necessary. Furthermore, in the Court below, no citations to the record were made on brief or in oral argument to testimony or exhibits which would sustain the quoted conclusion. The Commission's conclusion that unjust discrimination against shippers exists is in the abstract, and no place in the report is it made concrete by discussion of specific or general disadvantage to any shipper. A conclusion that Section 2 of the Act has been violated must flow from several subsidiary findings, including a finding based on evidence of record that unjust discrimination is practiced in the transportation of like traffic under "substantially similar circumstances and conditions". Compare *Cincinnati, New Orleans and Texas Pac. Ry. Co.* v. *United States,* 229 F.Supp. 572 (S.D. Ohio 1964).

Waterways Bulk Transportation Council, Inc. on pages 5 and 6 of its Motion to Affirm cites the *Arrow* case for the untenable position that under Section 2 of the Act, "discrimination" (unjust?) "prima facie exists to the extent that" a division received for an ex-rail movement is lower than an ex-barge rate, however, when the Court in that case held that the division of an outbound railroad is "*prima facie* evidence as to what charge should be assessed upon ex-barge movements" it was resolving the Section 3(4) issue. 176 F.Supp. 411, 418 and 419. In its consideration of Section 2 of the Act, unjust discrimination between shippers, the Court, page 421, confined its comparison to "higher rates" than ex-rail rates. Therefore, the *Arrow* case provides no authority for a finding that ex-barge rates higher than the lowest divisions of joint rail rates violate Section 2 of the Act.

On the record the Commission should have found that divisions of joint rail rates are not shown to be unjustly discriminatory against any shippers. In *L. & N. R.R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 234, the Supreme Court said:

> "The division of the joint rate among the participating carriers is a matter which in no way concerns the shipper. The shipper's only interest is that the joint rate be reasonable as a whole."

Accordingly, it must be concluded that such a division cannot cause unjust discrimination against a shipper.

Inasmuch as no shippers on the record claimed to be injured by divisions of joint rail rates, the Commission's Section 2 finding encourages and promotes unregulated and psuedo private carriage. As to the latter, a large grain shipper who can afford to ship in barge-load quantities can, if it has not already done so, organize a separate water-carrier corporation, which can hold-out to transport bulk commodities for others, even though it may never be called

upon to do so, and under the Commission's Section 2 finding, it would be called a "for-hire" carrier so that its *alter ego*, the large grain shipper, would be entitled to rail rates on a parity with the lowest divisions of joint rail rates. To compel regulated railroads to establish rates that promote expansion of unregulated and private carriage can only lead to the further decline of the regulated common-carrier industry with concurrent reductions in service and contractions in plant to the detriment of small shippers thereby hampering commercial competition. The result is inconsistent with the objectives of the National Transportation Policy. Contrast the following comment of the entire Commission in *Motor Transp. of Property Incidental to Air*, 95 M.C.C. 71, 86:

> "• • • the national transportation policy, which requires that we recognize and preserve the inherent advantages of each mode of transportation subject to our regulation. We would not be complying with the congressional mandate were we to adopt, in the absence of a clear legislative directive, a regulation which would greatly increase the scope of exempt transportation at the expense of those motor carriers which are subject to the economic regulation of the Interstate Commerce Act."

And in *Grain To, From, And Within Southern Territory*, 259 I.C.C. 629, 665, it was observed "that the rates of two competing carriers could not be regulated fairly in the absence of" the Commission's "regulation of both carriers".

On page 6 of the U. S. and I.C.C. Motion to Affirm, the attempt to meet the constitutional issue reveals a misunderstanding of the railroads' contention. Western railroads operate all-rail routes in direct competition with unregulated motor-water-motor routes for available grain traffic from the considered production origins to Arkansas and Louisiana. For example, the Chicago, Rock Island and

Pacific R. Co. single-line routes from Illinois and Iowa corn country and wheat farms in Kansas to those destination States are in addition to joint line all-rail routes, which, among others, embrace the CRI&P to Chicago, Peoria, St. Louis, Omaha or Kansas City, thence Illinois Central R. Co. or Frisco to Memphis and CRI&P beyond. There can be no doubt that the effect of the Commission's order is to compel a rail rate adjustment from Memphis that will implement movement of grain to Memphis by unregulated carriers, and thereby divert from the CRI&P either its substantial hauls from country origins to those midwestern gateways, or CRI&P (single-line) long hauls to destinations. It is submitted that regulation of short-haul rail rates in a way that fosters transportation by unregulated carriers deprives regulated carriers, including the appellant railroads, of due process of law.

Bowles v. *Willingham*, 321 U.S. 503, 518, cited by Waterways Bulk Transportation Council, Inc., is readily distinguishable. The western railroads do not claim in this case that rate regulation of railroads and not of exempt water carriers is *per se* unconstitutional, although the President in his message to Congress recommended greater reliance on competition in transportation, and his predecessor advocated extension of the bulk commodities and agricultural products exemptions to the railroads. The crux of the western railroads' contention is that regulation of rail rates solely to promote the flow of traffic in unregulated channels, by diversion from regulated carriers, is unfair and violates the Fifth Amendment. The practical exercise of the police power by the Congress in wartime to control prices and rents had no such destructive objective.

It was not alleged, as inferred by the Government, that the order was unconstitutional because it required establishment of noncompensatory rail rates, although it was

pointed out that certain so-called alternative methods of compliance offered by the Commission's report were illusory, because first, if the ex-barge rates were published on a parity with the lowest divisions on the record, the cost evidence disclosed that such ex-barge rates would not be compensatory, particularly in view of the additional origination costs incurred in handling ex-barge traffic as compared with ex-rail, and second, if the outbound railroads' divisions were raised to a level that would be compensatory for handling ex-barge grain, including the necessary origin service costs, the divisions received by the inbound carriers would shrink automatically to noncompensatory levels. In regard to the latter, it must be kept in mind that the inbound carriers at Memphis and New Orleans absorb the full cost of providing transit service. Thus the inbound division must cover the cost of rail service to and from a transit facility. The third and last alternative was cancellation of the competitive joint all-rail rates with interchange between railroads at Memphis and New Orleans, an alternative which, if constitutional, is certainly not consistent with the National Transportation Policy.

Failure of the Commission to consider evidence of additional costs of handling ex-barge grain violates Section 8 of the Administrative Procedure Act. See page 7 of the Government's Motion to Affirm. Since rail movement studies revealed no ex-barge movements,[2] and there is no shipper evidence of movement, cost evidence could not be developed by time studies and observation of actual ex-barge rail movements to Arkansas and Louisiana. For such hypothetical shipments, use of the average cost studies prepared by the Commission's Cost Finding Section provided

2. For the short hauls involved it is conceded that motor carriers have an inherent low-cost advantage over western railroads in transporting ex-barge grain, whereas rail carriers have an inherent cost advantage on long hauls.

the most appropriate method of cost determination. In fact the I.C.C. relies upon these studies for disposition of almost all competitive rate cases, although modifications based on actual studies of particular cost elements are accepted. These average-cost studies are comprised of a logical compilation of all cost elements.

Exhibits in evidence show separately the cost elements applicable to ex-barge rail origination service, which origin service is not necessary and would not be performed by an outbound rail carrier on an ex-rail shipment received from another railroad for movement from Memphis to Arkansas or New Orleans to Louisiana. At page 770 of 316 I.C.C. 759, the Commission admits that considerable cost evidence was submitted. Then one cost element "among other things" is described and rejected in a perfunctory way as "inconclusive". There is no discussion of the other cost elements ("other things"), but it is concluded that the costs of handling ex-barge grain are not shown to be substantially greater than the cost of handling ex-rail grain from the same points. The words "substantially greater" are ambiguous and comparison from the same points is improper and contrary to probative evidence on the record. Divisions received by outbound rail carriers cover service from their yards where the inbound carriers deliver the ex-rail carloads. In connection with an ex-barge rate, these outbound railroads must provide or absorb the cost of a full origination service from the barge unloading dock. If the division is the measuring rod then the service provided to earn the division must be a yardstick, and obviously the cost of origination service must be added to the outbound division to obtain an equitable standard for determination of a nondiscriminatory ex-barge rate.

The burden or handicap cast upon the western rail carriers by this decision is probably premised upon the ap-

parently unintended handicap imposed by the *Mechling* case on the title complainant and other western railroads in the transportation of Illinois corn to Chicago. No attorney for the western railroads was before the Supreme Court in the *Mechling* case. Eastern railroads had accorded Chicago-to-east proportional grain rates voluntarily to ex-Lake spring wheat from the top of the Lakes, the same as applied on ex-rail spring and winter wheat, corn and other grains, but the ex-rail proportionals were subject to observance of the flat rate from Chicago as a minimum. Thus if the inbound rail rate on corn from the productive territory adjacent to the Illinois River was less than the difference between the outbound flat and proportional rates from Chicago to the same eastern destination, the eastern railroad would "pad" or increase the proportional rate so that the inbound and outbound rail rate combination would be equal to the flat rate. In the *Mechling* case, the ex-barge corn traffic was accorded unpadded proportional rates and the long-and-short-haul clause of the 4th Section was held not to be a bar. This situation has deprived the CRI&P from competing on a fair basis with barges from a large productive territory. Establishment of competitive western rail rates are a nullity because shippers know that on this ex-rail billing the outbound rail proportionals will have to be padded. Thus there is an embargo on rail corn from stations on CRI&P along the Illinois River from Peoria to Joliet.

Destruction of rail competition in this way is contrary to the 4th Section of the Interstate Commerce Act, but the *Mechling* case holds that the barge lines must be accorded this advantage, although a conventional "special case" required by Section 4 as a basis for relief could not be established because there is no competitive necessity for application to ex-barge corn from Illinois River loading termi-

nals to Chicago of Chicago-to-the-east rail rates less than the "padded" proportional rail rates applicable on ex-rail grain from the same respective origins.

This is not a proper proceeding for modification of inequities stemming from the *Mechling* decision, and no corrective action is proposed herein, but imposition of such handicaps in intermodal competition is now unlawful. *I.C.C.* v. *New York, N.H. & H. R. Co.*, 372 U.S. 744, 758. Prescription of ex-barge rates no higher than the lowest divisions of outbound railroads from Memphis and New Orleans to Arkansas and Louisiana imposes a handicap on the all-rail joint routes via those gateways. Construction of rail rates applicable to the final segment of compelled motor-barge-rail routes, without any allowance for the rail origination service required of outbound railroads on ex-barge grain from Memphis and New Orleans to Arkansas and Louisiana, but not required on corresponding ex-rail shipments, handicaps the all-rail routes, and indirectly results in involuntary subsidization by outbound railroads of the competitive water routes.

Adverse effects on western railroads are compounded by the fact that the handicap imposed by the Commission's order is purportedly derived or deduced from Section 3(4) which is confined to regulated traffic, nevertheless it is extended to unregulated water traffic by adoption of the Section 2 finding without any supporting evidence. In the last analysis, the Section 2 finding is supported only by citation of cases, which under any reasonable interpretation do not justify the pertinent finding. The Commission's ultimate findings and conclusions should have been held to be unsupported by adequate subsidiary findings and reasons for the conclusions. See *Nashua Motor Express, Inc.* v. *United States*, 230 F.Supp. 646, 650 [4].

Federal Trade Commission v. *Rubberoid Co.*, 343 U.S. 470, cited by Waterways Bulk Transportation Council, Inc., reviews the scope of an F.T.C. order. Contrary to the case at bar, the findings of price discrimination by Rubberoid were supported by evidence.

CONCLUSION

The record before I.C.C. is extensive, but a small portion is pertinent to issues raised herein. In fact on the Section 2 issue, the western railroads would make no record reference because they know of no supporting evidence, thus rebuttal evidence was not necessary. The questions raised are largely questions of law and application of the law to relatively simple factual situations. If jurisdiction were granted, western railroads would make record reference to less than 75 pages of transcript and 15 exhibits, consisting of: cost evidence, primarily concerning terminal costs at Memphis and New Orleans; testimony to show that the outbound railroads earn their divisions for service from their respective terminal yards and do not absorb any part of the inbound carriers' switching costs for movement from transit facilities to the outbound railroads' yards; summaries of movement studies; applicable divisions; and testimony revealing that complainant barge lines make movements exempt under Section 303(b), to controvert the footnote representation on page 7 of Federal's Motion to Affirm. The Railroads' brief would be less than 50 printed pages. Very few record references were made by the Government and the barge lines in the District Court below. Under Section 10(e) of the Administrative Procedure Act, review of the portions of the record cited by the parties is sufficient. Therefore, resolution of the important legal questions presented would not impose a workload on the Supreme Court that the size of the record might otherwise imply.

Inequities flowing from the Commission's lean-over-backwards misapplication of principles enunciated in *Mechling* and *Arrow* cases, can only impede utilitarian and economical co-ordination of regulated transportation facilities. Rail-rate legislation is a continuing process based on changing shipper and market requirements. Shippers' applications for establishment of joint rates to move prospective traffic in volume and with regularity cannot be given proper consideration when the Commission's order requires the outbound railroad from barge unloading ports to tack on a free origination service on ex-barge traffic. Action by the Supreme Court is essential to bring about equality of treatment so that grain and grain products will flow freely in interstate commerce.

For the foregoing reasons, the appellant railroads request denial of the Motions to Affirm.

Respectfully submitted,

DON MCDEVITT
139 West Van Buren Street
Chicago, Illinois 60605

M. L. CASSELL
J. A. GILLEN
J. J. NAGLE
W. E. DAVIS
W. A. THIE
R. H. STAHLHEBER
H. B. LATOURETTE
R. J. LEHMAN
E. N. BELL
T. L. FARMER

Counsel for Appellants

March 4, 1965